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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B6

Date: **NOV 14 2011** Office: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On October 15, 2002, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the VSC director on November 1, 2003. The director of the Texas Service Center (“the director”), however, revoked the approval of the immigrant petition on May 8, 2009, and the petitioner subsequently appealed the director’s decision to revoke the petition’s approval. The petition is now before the Administrative Appeals Office (AAO) on appeal. The director’s decision will be withdrawn. The appeal will be remanded to the director for further action, consideration, and the entry of a new decision.

The petitioner is a landscaping company. It seeks to employ the beneficiary permanently in the United States as a landscape gardener pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3)(A)(i).¹ As required by statute, the petition is submitted along with an approved Form ETA 750 labor certification. As stated earlier, this petition was approved on November 1, 2003 by the VSC, but that approval was revoked in May 2009. The director determined that the petitioner failed to follow the U.S. Department of Labor (DOL) recruitment procedures and that the documents submitted in response to the director’s Notice of Intent to Revoke (NOIR) were in themselves a willful misstatement of material facts, constituting fraud. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On appeal, current counsel for the petitioner – [REDACTED] – contends that the director has improperly revoked the approval of the petition. Specifically, counsel asserts that U.S. Citizenship and Immigration Services (USCIS) cannot retroactively use and apply section 205 of the Act as amended on December 17, 2004 to revoke the petition that was approved in November 2003. Citing *Firstland Int’l, Inc. v. Ashcroft*, 377 F.3d 127 (2d Cir. 2004), counsel further claims that the statute in effect at the time of the visa approval specifically required the Attorney General to notify the State Department of the visa revocation before the beneficiary came to the United States.³ In this case, counsel notes that since the beneficiary has already been

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

² Current counsel of record, [REDACTED], will be referred to as counsel throughout this decision. Previous counsel, [REDACTED] will be referred to as previous or former counsel or by name.

³ At the time the visa petition in this case was approved in November 2003, section 205 of the Act, 8 U.S.C. § 1155, read as follows:

The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under

in the United States when the decision to revoke was issued, the Attorney General should not be able to revoke the approval of the visa petition.

Counsel also contends that the director did not have any good and sufficient cause as required by section 205 of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1155 to revoke the approval of the petition. For instance, counsel states that the director only made vague, unsubstantiated allegations of fraud or material misrepresentation relating to other petitions and petitioners, and that neither the Notice of Intent to Revoke (NOIR) nor the Notice of Revocation (NOR) contained specific adverse information relating to the petition or the petitioner in the instant proceeding.

In addition, counsel states that the finding of fraud or material misrepresentation against the petitioner was not supported by any evidence of record. Counsel indicates that the DOL would not have approved the petitioner's Form ETA 750 had it not followed the DOL recruitment requirements.

With respect to the director's requiring documentary proof of recruitment, counsel states that the petitioner, at the time when it filed the Form ETA 750 with the DOL for processing, was not required to retain any documentary evidence relating to its recruitment efforts once the labor certification had been approved. In addition, counsel also states that the director, by waiting more than five years after the labor certification was approved by the DOL to issue the NOIR, has placed both the petitioner and the beneficiary in the impossible position of obtaining the recruitment evidence, which has long been lost, expunged, or destroyed. In summary, counsel argues that the issuance of the NOIR more than five years after the DOL approved the Form ETA 750 violates the petitioner's rights to due process.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁴

section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition. In no case, however, shall such revocation have effect unless there is mailed to the petitioner's last known address a notice of the revocation and unless notice of the revocation is communicated through the Secretary of State to the beneficiary of the petition before such beneficiary commences his journey to the United States. If notice of revocation is not so given, and the beneficiary applies for admission to the United States, his admissibility shall be determined in the manner provided for by sections 1225 and 1229a of this title.

⁴ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Although not raised by counsel on appeal, the AAO finds that, procedurally, the director's use of 8 C.F.R. § 205.1 to revoke the approval of the petition in the instant proceeding is not proper. Under 8 C.F.R. § 205.1(a)(3)(iii), a petition is automatically revoked if (A) the labor certification is invalidated pursuant to 20 C.F.R. § 656; (B) the petitioner or the beneficiary dies; (C) the petitioner withdraws the petition in writing; or (D) if the petitioner is no longer in business. Here, the labor certification has not been invalidated; neither the petitioner nor the beneficiary has died; the petitioner has not withdrawn the petition; nor has the petitioner gone out of business. Therefore, the approval of the petition cannot be automatically revoked. The director's erroneous citation of the applicable regulation is withdrawn. Nonetheless, as the director does have revocation authority under 8 C.F.R. § 205.2, the director's denial will be considered under that provision under the AAO's *de novo* review authority.

In his brief, counsel draws the AAO's attention to a recent opinion issued by the United States Court of Appeals for the Second Circuit, *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d 127 (2d Cir. 2004). In that opinion, the court in *Firstland* interpreted the third and fourth sentence of section 205 of the Act, 8 U.S.C. § 1155 (2003), to render the revocation of an approved immigrant petition ineffective where the beneficiary of the petition did not receive notice of the revocation before beginning his journey to the United States. *Firstland*, 377 F.3d at 130. Counsel asserts that the reasoning of this opinion must be applied to the present matter and accordingly, that USCIS may not revoke the approval because the beneficiary did not receive notice of the revocation before departing for the United States, since he was already in the United States when the director issued the revocation.

According to the Form G-28 submitted on appeal, the petitioner is located in West Roxbury, Massachusetts, an area within the jurisdiction of the First Circuit Court of Appeals. The holding in the Second Circuit Court of Appeals, therefore, is not binding in this case; but even if this case did arise in the Second Circuit, *Firstland* is no longer a binding precedent.

On December 17, 2004, the President signed the Intelligence Reform and Terrorism Prevention Act of 2004 (S. 2845). See Pub. L. No. 108-458, 118 Stat. 3638 (2004). Specifically relating to this matter, section 5304(c) of Public Law 108-458 amends section 205 of the Act by striking "Attorney General" and inserting "Secretary of Homeland Security" and by striking the final two sentences. Section 205 of the Act now reads:

The Secretary of Homeland Security may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition.

Furthermore, section 5304(d) of Public Law 108-458 provides that the amendment made by section 5304(c) took effect on the date of enactment and that the amended version of section 205 applies to revocations under section 205 of the Act made before, on, or after such date. Accordingly, the amended statute specifically applies to the present matter and counsel's *Firstland* argument no longer has merit.

In addition, federal regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed or when the visa is issued by a United States consulate. 8 C.F.R. § 245.1(a), 22 C.F.R. § 42.41.

If the beneficiary of an approved visa petition is no longer eligible for the classification sought, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for "good and sufficient cause." Notwithstanding the USCIS burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

The AAO will next address whether the director adequately advised the petitioner of the basis for revocation of approval of the petition.

As noted above, section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, allows the Secretary of Department of Homeland Security to revoke the approval of any visa petition approved under section 204 so long as the revocation is made based on good and sufficient cause. The realization by the director that the petition was approved in error, for instance, may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

However, before the director can revoke the approval of the petition, the regulation requires that a notice must be provided to the petitioner. More specifically, 8 C.F.R. § 205.2 reads:

(a) *General.* Any Service [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice** to the petitioner on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this Service [USCIS]. (emphasis added).

Further, the regulation at 8 C.F.R. § 103.2(b)(16) states:

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Moreover, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Here, in the Notice of Intent to Revoke (NOIR), the director wrote:

The Service is in receipt of information revealing the existence of fraudulent information in the petitions with Alien Employment Certificates (ETA 750) and/or the work experience letters in a significant number of cases submitted to USCIS by counsel for the petitioner in the reviewed files [referring to the petitioner's previous counsel, ██████████]

The director advised the petitioner in the NOIR that the instant case might involve fraud since the petition was filed by ██████████ who is under USCIS investigation for submitting fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions. The director generally questioned the beneficiary's qualifications. The director also specifically stated that in many of the other petitions filed by previous counsel, the respective petitioners had not followed DOL recruitment procedures. Because of these findings in other cases and since ██████████ filed the petition in this case, the director on February 11, 2009 issued the NOIR, advising the petitioner to submit additional evidence to demonstrate that the beneficiary had at least two years of work experience in the job offered before the labor certification application was filed with the DOL and that the petitioner complied with all of the DOL recruiting requirements.

The AAO finds that while the director appropriately reopened the approval of the petition by issuing the NOIR, the director's NOIR was deficient in that it did not give the petitioner notice of the derogatory information specific to the current proceeding. In the NOIR, the director questioned the beneficiary's qualifications and indicated that the petitioner had not properly advertised for the position. The NOIR neither provided nor referred to specific evidence or information relating to the petitioner's failure to comply with DOL recruitment or to the beneficiary's lack of qualifications in the present case. The director did not state which recruitment procedures were defective. In the NOR, the director concluded that the petitioner failed to submit a copy of the internal posting, or in the alternative, an affidavit indicating that the petitioner in fact did comply with that internal posting requirement.

The AAO disagrees with the director's conclusion. First, the director in the NOIR did not notify the petitioner to specifically submit any copies of the results of the recruitment efforts, including the copy of the in-house posting. Without specifying or making available evidence specific to

the petition in this case, the petitioner can have no meaningful opportunity to rebut or respond to that evidence. *See Ghaly v. INS*, 48 F.3d 1426, 1431 (7th Cir. 1995).

Additionally, since there was no requirement to keep such records, the director may not make an adverse finding against the petitioner, if, the petitioner claims it no longer has the supporting documentation over five years after the labor certification was approved. The AAO acknowledges that at the time the petitioner filed the labor certification application with the DOL for processing in April 2001, employers were not required to maintain any records documenting the labor certification process once the labor certification had been approved by the DOL. *See* 45 Fed. Reg. 83933, Dec. 19, 1980 as amended at 49 Fed. Reg. 18295, Apr. 30, 1984; 56 Fed. Reg. 54927, Oct. 23, 1991. Not until 2005, when the DOL switched from paper-based to electronic-based filing and processing of labor certifications, were employers required to maintain records and other supporting documentation, and even then employers were only required to keep their labor certification records for five years. *See* 69 Fed. Reg. 77386, Dec. 27, 2004 as amended at 71 Fed. Reg. 35523, June 21, 2006; *also see* 20 C.F.R. § 656.10(f) (2010).

Hence, because of insufficient notice to the petitioner of derogatory information, the director's decision will be withdrawn. Nevertheless, the AAO determines that the petition's approval cannot be reinstated without further development of facts regarding the petitioner's efforts to recruit U.S. workers.

The DOL regulation at 20 C.F.R. § 656.21 (2001) required, at the time of recruitment in this case, that the employer clearly document, as a part of every labor certification application, its reasonable, good faith efforts to recruit U.S. workers without success. Such documentation should include the sources the employer may have used for recruitment, including, but not limited to, advertising; public and/or private employment agencies; colleges or universities; vocational, trade, or technical schools; labor unions; and/or development or promotion from within the employer's organization. The documentation should also identify each recruitment source by name; give the number of U.S. workers responding to the employer's recruitment; give the number of interviews conducted with U.S. workers; specify the lawful job-related reasons for not hiring each U.S. worker interviewed; and specify the wages and working conditions offered to the U.S. workers.

The AAO notes that the signature of the petitioner's owner [REDACTED] on the Form ETA 750, part A, dated January 29, 2001, is very different from the Form I-140 filed on October 15, 2002 and from the Form G-28 dated August 29, 2002, in that the former signature is fully written in cursive script and the latter contain only the initials "JM."

The regulation at 8 C.F.R. § 103.2(a)(2) stated:⁵

Signature. An applicant or petitioner must sign his or her application or petition. However, a parent or legal guardian may sign for a person who is less than 14

⁵ The regulation cited at 8 C.F.R. § 103.2(a)(2) is the pre-PERM regulation applicable to the instant case.

years old. A legal guardian may sign for a mentally incompetent person. By signing the application or petition, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the application or petition, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this chapter, an acceptable signature on an application or petition that is being filed with the [USCIS] is one that is either handwritten or, for applications or petitions filed electronically as permitted by the instructions to the form, in electronic format.

The regulation at 20 C.F.R. § 656.20(b) stated:⁶

(1) Aliens and employers may have agents represent them throughout the labor certification process. If an alien and/or an employer intends to be represented by an agent, the alien and/or the employer shall sign the statement set forth on the Application for Alien Employment Certification form: That the agent is representing the alien and/or employer and that the alien and/or employer takes full responsibility for the accuracy of any representations made by the agent.

(2) Aliens and employers may have attorneys represent them. Each attorney shall file a notice of appearance on Immigration and Naturalization Service (INS) Form G-28, naming the attorney's client or clients. Whenever, under this part, any notice or other document is required to be sent to an employer or alien, the document shall be sent to their attorney or attorneys who have filed notices of appearance on INS Form G-28, if they have such an attorney or attorneys.

If neither the Form ETA 750 nor the Form I-140 petition was signed by an authorized representative of the petitioner, the petition should be dismissed, and the approved Form ETA 750 should be invalidated.

On remand, the director should in the new NOIR request the petitioner to outline what specific steps it took to conduct good faith recruitment, e.g. whether and how the company advertised in a newspaper of general circulation, and identifying the recruitment source by name; ask the petitioner how many candidates were interviewed; and if so, whether and how it conducted interviews and determined that no other U.S. candidate was eligible for the position; and specifying the job related reason for not hiring each U.S. worker; and whether and for how long the company posted an in-house posting notice recruiting for the position. The director should specifically ask the petitioner for copies of any objective, independent evidence to establish that the petitioner actively participated in the recruitment process and followed the DOL requirements to ensure that no United States worker was qualified, willing and available to take the position. If such evidence is unavailable, the petitioner should explain why it cannot be

⁶ The regulation cited at 20 C.F.R. § 656.20(b) is the pre-PERM regulation applicable to the instant case.

obtained.⁷ The director should ask the petitioner to explain the differences in signatures noted on the Forms G-28, ETA 750, and I-140. The director should also request the petitioner to state whether it advertised under supervised recruitment process or reduction in recruitment.

The AAO will next address the director's finding that the petitioner engaged in fraud and/or material misrepresentation. On appeal, counsel contends that the DOL's approval of the labor certification application indicates that there was no fraud or irregularity in the labor certification process.

The AAO disagrees with counsel's contention. If the petitioner or its previous counsel deceived the DOL in the recruitment process, then the labor certification is not valid and should be invalidated. In this case, however, the factual record does not establish that the petitioner failed to follow the DOL recruitment procedures. Similarly, there has been insufficient development of the facts upon which the director can rely to find that the petitioner and/or [REDACTED] engaged in fraud or material misrepresentation.

As immigration officers, USCIS Appeals Officers and Center Adjudications Officers possess the full scope of authority accorded to officers by the relevant statutes, regulations, and the Secretary of Homeland Security's delegation of authority. See sections 101(a)(18), 103(a), and 287(b) of the Act; 8 C.F.R. §§ 103.1(b), 287.5(a); DHS Delegation Number 0150.1 (effective March 1, 2003).

With regard to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of Homeland Security has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, make recommendations for prosecution, and take other "appropriate action." DHS Delegation Number 0150.1 at para. (2)(I).

The administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation for any issue of fact that is material to eligibility for the requested immigration benefit. Within the adjudication of the visa petition, a finding of fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. at 591-592.

⁷ As there was no requirement to keep such records, the director may not make an adverse finding against the petitioner if it claims it does not have the documentation. However, the AAO acknowledges the authority and interest of USCIS to request such documentation pursuant to our invalidation authority at 20 C.F.R. § 656.31(d) and the interest of the petitioner in proving its case by retaining and submitting such documentation to USCIS particularly in response to a fraud investigation. Further, the petitioner must resolve inconsistencies in the record by independent, objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Outside of the basic adjudication of visa eligibility, there are many critical functions of the Department of Homeland Security that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting a material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.⁸

Section 204(b) of the Act states, in pertinent part, that:

After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien . . . in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true.

Section 212(a)(6)(C) of the Act governs misrepresentation and states the following: "Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."

The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either:

- (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

⁸ It is important to note that, while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. See *Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. See sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, the AAO and USCIS have the authority to enter a fraud finding, if during the course of adjudication, the record of proceedings discloses fraud or a material misrepresentation.

Matter of S & B-C-, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

Furthermore, a finding of misrepresentation may lead to invalidation of the Form ETA 750. See 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

Here, as noted above, the director failed to advise the petitioner to provide specific evidence to show that the petitioner followed the DOL procedures in recruiting U.S. workers. For this reason, the petitioner did not have the opportunity to address this ground for revocation in response to the NOIR.

Further, the director did not notify the petitioner about the anomalies in the petitioner's signature on the Forms G-28, I-140, and ETA 750. As a consequence, the factual record is insufficiently developed to establish whether the petitioner and/or former counsel may have participated in the recruitment process. Thus, fraud or willful material misrepresentation has not been established at this time. Nor does the record currently reflect that the beneficiary engaged in fraud or material misrepresentation in the presentation of his credentials to the petitioner and through the petitioner to USCIS.

In summary, the AAO withdraws the director conclusion that the petitioner failed to follow the DOL recruitment requirements. The AAO also withdraws the director's finding of fraud and/or material misrepresentation.

Nevertheless, we find that the director's decision to revoke the approval of the petition is based on good and sufficient cause, as required by Section 205 of the Act, 8 U.S.C. § 1155. The petition is currently not approvable because the record suggests that the petitioner may not have authorized the filing of the Form ETA 750 or Form I-140, as reflected in the unexplained signature discrepancies noted above. Nor does the record contain sufficient evidence establishing the petitioner's ability to pay the proffered wage from the priority date, or that the beneficiary is qualified to perform the services of the proposed employment as of the priority

date. For these reasons, the petition will be remanded to the director for issuance of a new NOIR, in accordance with 8 C.F.R. § 205.2(a).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

With respect to the petitioner's ability to pay, the regulation at 8 C.F.R. § 204.5(g)(2), in pertinent part, provides:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, as stated above, the ETA Form 750 was accepted for processing by the DOL on April 4, 2001. The rate of pay or the proffered wage specified on the Form ETA 750 is \$11.40 per hour or \$20,748 per year based on a 35 hour work week.⁹

To demonstrate that the petitioner had the continuing ability to pay \$12.65 per hour or \$23,023 annually from March 20, 2003, the petitioner submitted the following document:

- A copy of the beneficiary's Forms W-2 for the years 2001, 2002, and 2004.

The evidence submitted above is not sufficient to demonstrate that the petitioner has the ability to continuously pay the proffered wage from the priority date until the beneficiary receives his

⁹ The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL Memo indicates that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

permanent residence or until he ported to another similar employment pursuant to section 204(j) of the Act, 8 U.S.C. § 1154(j) as amended by section 106(c) of AC21.¹⁰

On remand, the director should issue a NOIR requesting the petitioner to demonstrate the continuing ability to pay the proffered wage from the priority date until the beneficiary ported to work for another similar employment. Therefore, to meet the burden of proving by a preponderance of the evidence that the petitioner has the continuing ability to pay the proffered wage from the priority date, the director, in the new NOIR, should, at a minimum, request the following additional evidence from the petitioner:

- Copies of the petitioning organization's federal tax returns, annual reports, and/or audited financial statements for the years 2001 through 2006;
- Copies of the beneficiary's W-2s, 1099-MISCs, paystubs, or other documents that the petitioning organization issued to the beneficiary for the years 2003, 2005, and 2006.

Further, the AAO finds that the record does not reflect that the beneficiary was qualified for the position in the job offered as a landscape gardener as of the priority date.

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

Here, the Form ETA 750, as noted earlier, was filed and accepted for processing by the DOL on April 4, 2001. The name of the job title or the position for which the petitioner seeks to hire is “Landscape Gardener.” Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote:

Under direction of owner, execute all types of landscaping projects, including preparation of ornamental gardens, pool areas, grading, seeding, sodding,

¹⁰ Based on the evidence submitted in response to the director's NOIR, the beneficiary started his own landscaping business called [REDACTED] and began working for his own company in March 2007. Counsel for the beneficiary argues that the beneficiary validly ported to work for his own business. It is important to note here that section 204(j) of the Act does not apply to an immigrant visa petition process but to an application for adjustment of status. Thus, whether or not section 204(j) of the Act allows the beneficiary to port to work for his own business is not relevant to the outcome of this proceeding, and we will not address the validity of the beneficiary's porting to work for his own company in this decision. This question, which arises as a consequence of the statutory provisions at section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) and section 204(j) of the Act, is appropriately deferred to the Form I-485 adjustment of status adjudication.

cultivating, maintaining, construct small walls and lay elementary walks; maintain and overhaul equipment, prune, transplant.

The DOL classified this job description as a landscape gardener under DOT (Dictionary of Occupational Titles) job code 408.161-010.¹¹ Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith*, 696 F.2d, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

As set forth above, the proffered position requires the beneficiary to have a minimum of two years of work experience in the job offered. On the Form ETA 750, part B, signed by the beneficiary on January 29, 2001, he represented he worked as a landscape gardener for a farm called [REDACTED] from February 1992 to December 1997. Under the job description, the beneficiary stated, "I performed all types of landscaping duties, including cultivating, mowing, transplanting, pruning, erecting stone walls and laying walks, etc."

Submitted along with the approved labor certification and the Form I-140 petition, the petitioner submitted a certified statement dated March 21, 2001 from [REDACTED] stating that the beneficiary worked as a landscape gardener from February 1, 1992 to December 20, 1997; his duties were cultivating, weeding, seeding, and gathering plants.

Before revoking the approval of the petition, the director sent a notice of intent to revoke (NOIR) dated February 11, 2009 notifying the petitioner that USCIS could not confirm or verify the existence of [REDACTED] since the certified statement of employment dated March 21, 2001 from [REDACTED] contained no CNPJ number.¹² Accordingly, the director advised the petitioner to provide additional evidence to demonstrate that the beneficiary had the requisite work experience in the job offered as of the filing date of the labor certification (April 4, 2001).

¹¹ The DOT job code can be accessed at <http://www.occupationalinfo.org/>

¹² CNPJ or [REDACTED] is a unique number given to every business registered with the Brazilian authority. In Brazil, a company can hire employees, open bank accounts, buy and sell goods only if it has a CNPJ. The Department of State has determined that the CNPJ provides reliable verification with respect to the adjudication of employment-based petitions in comparing an individual's stated hire and working dates with a Brazilian-based company to that Brazilian company's registered creation date.

In response to the director's NOIR and to demonstrate that [REDACTED] existed during the period when the beneficiary claimed to have worked there between 1992 and 1997, the petitioner submitted the following evidence:

- A sworn statement dated February 27, 2009 from [REDACTED] indicating that he employed the beneficiary from February 1, 1992 to December 20, 1997, that the beneficiary worked as a laborer, and that his duties included planting, maintaining the crops, and also using defensive products to protect the crops;
- A certificate from the Brazilian Registry of Agricultural Property issued in August 1997 showing that [REDACTED] owns a property called [REDACTED] located in Simonesia, MG (Minas Gerais), Brazil;
- A deed of the property located in Simonesia, MG, as recorded in the County of Manhuacu, MG;
- County records dated February 20, 1998 describing the property located in Simonesia, MG; and
- Property tax records for the years 2004 through 2007.

In adjudicating the appeal, the AAO observes that the beneficiary was only 14 years of age in February 1992 when he claimed he began to work [REDACTED]. We also note that the information regarding where the beneficiary worked between February 1992 and December 1997 was not listed on the Form G-325 (Biographic Information), under a section eliciting information about the beneficiary's last occupation abroad. The beneficiary was likely in school full-time during that time period (when he was 14 years of age). He did not, however, list on the Form ETA 750, part B, item number 11, that he attended school.

Based on the inconsistencies in the record as noted above and because of the beneficiary's young age when he started to work for [REDACTED] and the likelihood that he was attending school full-time when he was 14 years old, the AAO has determined that the beneficiary may have misrepresented his work experience in order to obtain an immigration benefit.

Further, the labor certification requires that the candidate in the position have experience preparing ornamental gardens and pool areas; constructing small walls and elementary walks; and maintaining and overhauling equipment. The letter of experience states that the beneficiary's duties for Mr. Bento included working "as a laborer planting, maintaining the crops, and also using defensive products to protect the crops." The letter of experience does not outline experience in any of the skilled areas of work experience as set forth on the Form ETA 750, e.g. preparing ornamental gardens and pool areas; constructing small walls and elementary walks; or maintaining and overhauling equipment.

As indicated earlier, the petitioner must demonstrate that, on the priority date the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition. Here, it does not appear that the beneficiary had those skills and qualifications specified on

the Form ETA 750 before the priority date. Thus, the beneficiary is not qualified for the position offered.

In order to meet the burden of proving by a preponderance of the evidence that the beneficiary had two years full-time work experience in the job offered prior to the priority date (April 4, 2001) the director should, on remand, request the following evidence pursuant to 8 C.F.R. § 103.2(b)(8)(iv):

- Copies of pay stubs, payroll records, tax documents, or financial statements or other evidence, i.e. Brazilian booklet of employment and social security, to show employment of the beneficiary at [REDACTED] from February 1992 to December 1997;
- School transcripts of the beneficiary from 1992 to 1997;
- A copy of a government-issued identification card reflecting where the beneficiary lived and worked between 1992 and 1997; and
- Proof that the beneficiary performed the skilled duties of landscape gardener listed on the Form ETA 750 for two years prior to the filing date of April 4, 2001.

Further, on remand the director may pursue the revocation of approval of the petition for fraud and misrepresentation in connection with the labor certification process, provided that the director specifically outlines what the deficiencies are with respect to the labor certification, points out how the petitioner or the petitioner's previous counsel [REDACTED] may have engaged in fraud or misrepresentation in the labor certification process, and gives the petitioner the opportunity to respond to the specific deficiencies in response to the NOIR. For instance, a finding of fraud and/or misrepresentation may be justified if previous counsel intentionally and knowingly submitted the Form ETA 750 before the recruitment efforts were completed, if the petitioner's agent/counsel impermissibly participated in the consideration of U.S. applicants for the job (by interviewing the prospective applicants), or if the petitioner did not authorize the filing of the labor certification application and the petition through its signature and the petitioner intentionally and knowingly failed to disclose such information, and such omission was material to the approval of the labor certification.

In summary, the director's decision to revoke the approval of the petition is withdrawn. The approval of the petition, however, may not be reinstated under the facts of record. The petition is, therefore, remanded to the director for issuance of a new Notice of Intent to Revoke (NOIR) specifically outlining the inconsistencies in the record pertaining to the anomalies in the petitioner's signature as discussed above and the beneficiary's job duties at the claimed qualifying employment. The director in the new NOIR should also request the petitioner to submit additional evidence to show the continuing ability to pay from the priority date until the beneficiary receives lawful permanent residence or until he ported to another similar employment.

The director may request any evidence relevant to the outcome of the decision and should afford the petitioner a reasonable opportunity to respond. If the director pursues fraud against the beneficiary, he should issue a separate Notice of Derogatory Information and Request for

Evidence (NDI/RFE) specifically informing him of the derogatory information and giving him a chance to respond.¹³ Upon review and consideration of any response, the director shall enter a new decision.

ORDER: The director's decision to revoke the approval of the petition is withdrawn. However, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the AAO for review.

¹³ Alien beneficiaries do not normally have standing in administrative proceedings. *See Matter of Sano*, 19 I. & N. Dec. 299, 300 (BIA 1985). Alien beneficiaries ordinarily do not have a right to participate in proceedings involving the adjudication of a visa petition, as the petition vests no rights. *See Matter of Ho*, 19 I. & N. Dec. 582, 589 (BIA 1988). Moreover, there are no due process rights implicated in the adjudication of a benefits application. *See Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1050-51 (9th Cir. 2008); *see also Lyng v. Payne*, 476 U.S. 926, 942 (1986) ("We have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment."). However, since a fraud finding affects an alien's admissibility, USCIS should permit the limited participation of the beneficiary to respond to the derogatory information that directly impacts his ability to procure benefits in any future proceedings. *Cf. Matter of Obaigbena*, 19 I. & N. Dec. 533, 536 (BIA 1988). Therefore, the beneficiary should be provided separate notice, and the response by beneficiary will be considered herein.